Filed 2/24/17 P. v. Robison CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

RAYMOND RAY ROBISON,

Defendant and Appellant.

F071955

(Super. Ct. No. BF142506A)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Michael B. Lewis, Judge.

Patrick J. Hennessey, Jr., under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Michael P. Farrell, Assistant Attorney General, Eric L. Christoffersen and Ward A. Campbell, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

This appeal follows the trial court's denial of defendant Raymond Ray Robison's motion to dismiss three prior prison term enhancements, brought after he successfully petitioned pursuant to Proposition 47 for reclassification to misdemeanors of the felony convictions underlying those prison terms. (Pen. Code, § 1170.18, subd. (f).)[1]

In this case, defendant was charged by complaint with six counts arising out of offenses he committed on or around June 8, 2012, against Guimarra Vineyards.[2] On July 23, 2012, defendant pled no contest to the allegations that he committed felony grand theft (§ 487, subd. (a)) (count 1), felony receipt of stolen property (§ 496, subd. (a)) (count 2), two counts of petty theft with a qualifying prior conviction (§ 666) (counts 3 & 4), felony possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)) (count 5), and misdemeanor resistance of an officer (§ 148, subd. (a)(1)) (count 6). Defendant also admitted three prior serious felony convictions within the meaning of the three strikes law and seven prior prison term enhancements.

On August 21, 2012, the trial court granted defendant's request to strike the prior serious felony convictions and sentenced him to the upper term of three years and to seven consecutive one-year terms for each of the prior prison term enhancements for a total term of 10 years. Terms on the remaining counts were stayed. The court stayed execution of its sentence and placed defendant on probation upon various terms and conditions.

On March 13, 2013, defendant was arraigned on allegations that he violated the terms and conditions of his probation. At the conclusion of a contested hearing, the trial

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1 Further statutory references are to the Penal Code unless otherwise noted.

2 We take judicial notice of the record on appeal in our prior nonpublished opinion (*People v. Robison* (Apr. 10, 2014, F067525), both on our own motion and at the parties' request. (Evid. Code, §§ 452, subd. (d)(1), 459; Cal. Rules of Court, rule 8.252(a)(2); *People v. McCarthy* (2016) 244 Cal.App.4th 1096, 1100, fn. 2.)

court found true the allegations that defendant violated the terms of his probation and revoked probation. The court lifted the stay on defendant's sentence and ordered defendant's commitment to prison for 10 years.

On December 4, 2014, following the enactment of Proposition 47, discussed *post*, defendant filed a petition seeking recall and resentencing on counts 1 through 5.[3] (§ 1170.18, subd. (a).) On January 21, 2015, the trial court granted his petition as to count 5, but denied it as to counts 1 through 4 on the ground defendant is ineligible for resentencing because the value of the items taken from Guimarra Vineyards exceeded the allowable limit ($950). (§§ 1170.18, subd. (b), 490.2, subd. (a).) Defendant appealed the denial of his petition as to counts 1 and 2, and that appeal, *People v. Robison*, case No. F071215, is currently pending before this court.[4]

Defendant also brought a petition to have three prior felony convictions for which he served prison terms reclassified as misdemeanors pursuant to Proposition 47. The trial court granted that petition on April 30, 2015. (§ 1170.18, subd. (f).) On June 11, 2015, defendant filed a motion in this underlying case seeking to dismiss three of the seven prior prison term enhancements based on their reclassification to misdemeanors. On July 13, 2015, the trial court denied the motion and defendant appealed.

Defendant challenges the trial court's denial of his motion to dismiss the three prior prison term enhancements and argues the court erred in finding no legal basis for dismissal. The People seek dismissal of this appeal on the ground the trial court lacked jurisdiction to consider the motion to dismiss the prior prison term enhancements because defendant's prior appeal of the court's ruling on his first petition for relief under

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3 We take judicial notice of the record on appeal in defendant's related appeal (*People v. Robison* (Feb. 24, 2017, F071215) [nonpub. opn.]), both on our own motion and at the People's request. (Evid. Code, §§ 452, subd. (d)(1), 459; Cal. Rules of Court, rule 8.252(a)(2); *People v. McCarthy*, *supra*, 244 Cal.App.4th at p. 1100, fn. 2.)

4 We resolve that appeal in a separate but concurrently issued decision.

Proposition 47 is still pending. Alternatively, they argue that defendant's motion to dismiss his prior prison term enhancements was untimely and that he lacks entitlement under Proposition 47 to have the enhancements dismissed, or stricken.

We find defendant is not entitled to have his prior prison term enhancements dismissed and we affirm the trial court's order.

DISCUSSION

I. Jurisdictional Issue

A. Proposition 47

"'On November 4, 2014, the voters enacted Proposition 47, the Safe Neighborhoods and Schools Act [(the Act)] ….' [Citation.] 'Proposition 47 makes certain drug- and theft-related offenses misdemeanors, unless the offenses were committed by certain ineligible defendants. These offenses had previously been designated as either felonies or wobblers (crimes that can be punished as either felonies or misdemeanors).' [Citation.]

"Proposition 47 also added section 1170.18, concerning persons currently serving a sentence for a conviction of a crime that the proposition reduced to a misdemeanor. It permits such a person to 'petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing in accordance with' specified sections that 'have been amended or added by this act.' (§ 1170.18, subd. (a).) If the trial court finds that the person meets the criteria of subdivision (a), it must recall the sentence and resentence the person to a misdemeanor, 'unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.' (§ 1170.18, subd. (b).)"[5] (*People v.*

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[5] Section 1170.18, subdivisions (a) and (j) were amended effective January 1, 2017, to (1) change the terms of statutory application from "[a] person currently serving a sentence for a conviction" to "[a] person who on November 5, 2014, was serving a sentence for a conviction," and (2) extend the petition or application filing date from "within three years after the effective date of the act that added this section or at a later date upon a showing of good cause" to "on or

Morales (2016) 63 Cal.4th 399, 404 (*Morales*); accord, *People v. Sauceda* (2016) 3 Cal.App.5th 635, 640, review granted Nov. 30, 2016, S237975.)

B. Trial Court's Jurisdiction Over Second Proposition 47 Request

The People contend that because defendant's appeal of the trial court's order denying his first petition for relief under Proposition 47 is still pending, the trial court lacked jurisdiction to consider his second request for relief in the form of the motion to dismiss the three prior prison terms. Without citation to any authority, defendant asserts that we have jurisdiction over this appeal because although both appeals arise from the same underlying criminal case, this appeal raises issues unrelated to those in his other appeal and that both requests for relief under section 1170.18 were timely.

"Subject to limited exceptions, well-established law provides that the trial court is divested of jurisdiction once execution of a sentence has begun. [Citation.] And, '[t]he filing of a valid notice of appeal vests jurisdiction of the cause in the appellate court until determination of the appeal and issuance of the remittitur.' [Citations.] This rule protects the appellate court's jurisdiction by protecting the status quo so that an appeal is not rendered futile by alteration. [Citations.] As a result of this rule, the trial court lacks jurisdiction to make any order affecting a judgment, and any action taken by the trial court while the appeal is pending is null and void." (*People v. Scarbrough* (2015) 240 Cal.App.4th 916, 923; accord, *People v. Yearwood* (2013) 213 Cal.App.4th 161, 177.)

None of the limited exceptions to divestment of jurisdiction—vacating a void judgment, correcting an unauthorized sentence, correcting clerical errors in the judgment, correcting presentence custody credit calculation errors, recalling a sentence within 120 days for resentencing and filing a petition for writ of habeas corpus—apply here and defendant does not contend otherwise. (*People v. Scarbrough*, *supra*, 240 Cal.App.4th at

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before November 4, 2022, or at a later date upon showing of good cause." (Legis. Counsel's Dig., Assem. Bill No. 2765, approved by Governor, Sept. 28, 2016 (2015-2016 Reg. Sess.) pp. 1–3.)

pp. 923–924.) Thus, it appears defendant's earlier appeal of the trial court's order denying his first petition for relief under section 1170.18, subdivision (a), divested the trial court of jurisdiction to consider his second request for relief under section 1170.18. That the requests for relief under Proposition 47 targeted different issues is of no consequence: both petitions for relief pertain to the same underlying criminal case and sentence. We need not decide whether the trial court was divested of jurisdiction, however, because defendant's claim also fails on the merits.

II. Entitlement to Dismissal of Prior Prison Term Enhancements Based on Reclassification

As previously stated, on April 30, 2015, the trial court granted defendant's Proposition 47 petition and reduced to misdemeanors three prior convictions upon which the prior prison term allegations were based. Relying on section 1170.18, subdivision (k), *People v. Park* (2013) 56 Cal.4th 782 (*Park*) and *People v. Camarillo* (2000) 84 Cal.App.4th 1386 (*Camarillo*), defendant argues that because his prior felony convictions have now been reduced to misdemeanors for all purposes, they no longer support the prior prison term allegations under section 667.5, subdivision (b).[6,7]

We recently considered and rejected this argument in *People v. Johnson* (2017) 8 Cal.App.5th 111 (*Johnson*). In doing so, we addressed the decision in *Park*, observing that in that case, "the defendant's sentence for his current crimes was enhanced by five years under section 667, subdivision (a), based on his prior conviction of a serious felony. *Prior to* the defendant's commission of his current crimes, however, the trial court

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6 Subdivision (k) of section 1170.18 provides, in relevant part: "Any felony conviction that is … designated as a misdemeanor under subdivision (g) shall be considered a misdemeanor for all purposes, except that such resentencing shall not permit that person to own, possess, or have in his or her custody or control any firearm or prevent his or her conviction under Chapter 2 (commencing with Section 29800) of Division 9 of Title 4 of Part 6."

7 We note that several cases addressing this issue have been granted review. (E.g., *People v. Williams*, review granted May 11, 2016, S233539; *People v. Carrea*, review granted Apr. 27, 2016, S233011; *People v. Ruff*, review granted May 11, 2016, S233201; *People v. Valenzuela*, review granted Mar. 30, 2016, S232900.)

reduced the prior offense to a misdemeanor under section 17, subdivision (b)(3).[6] [Citation.]

"In *Park*, the Court of Appeal held the conviction remained a prior serious felony for purposes of sentence enhancement under section 667, subdivision (a), but the California Supreme Court disagreed: '[W]hen the court in the *prior proceeding* properly exercised its discretion by reducing the … conviction to a misdemeanor, that offense no longer qualified as a prior serious *felony* within the meaning of section 667, subdivision (a), and could not be used, under that provision, to enhance [the] defendant's sentence.' [Citation.]" (*Johnson, supra*, 8 Cal.App.5th at pp. 118–119.)

Similarly, in *Camarillo*, the Court of Appeal held that "when a court acts under … section 17 to specify that a conviction for driving under the influence of alcohol shall be treated as a misdemeanor 'for all purposes,' that offense may not afterwards be pled as a prior felony conviction under the terms of former Vehicle Code section 23175.5, now Vehicle Code section 23550.5 (Stats. 1998, ch. 118, § 84), even though the offense may have been originally punished as a felony." (*Camarillo*, *supra*, 84 Cal.App.4th at p. 1388.)

Defendant's reliance on *Park* and *Camarillo* is misplaced, however, because in those cases, the reduction of the offense occurred *prior* to the defendant's commission of his current crimes. (*Park*, *supra*, 56 Cal.4th at p. 787; *Camarillo*, *supra*, 84 Cal.App.4th at pp. 1388–1389.) Here, as in *Johnson*, "the reduction to a misdemeanor pursuant to section 1170.18, subdivision (f), occurred *after* [the] defendant's commission, conviction, and sentence for his current crimes." (*Johnson*, *supra*, 8 Cal.App.5th at p. 119.)

"6 Section 17, subdivision (b)(3) states in part: 'When a crime is punishable, in the discretion of the court, either by imprisonment in the state prison or imprisonment in a county jail …, it is a misdemeanor for all purposes … [¶] … [¶] … [w]hen the court grants probation to a defendant without imposition of sentence and at the time of granting probation … declares the offense to be a misdemeanor.'"

As we explained in *Johnson*, "[t]he issue before us is not whether defendant's underlying convictions and prison commitments … can now be used to enhance a future sentence pursuant to section 667.5, subdivision (b), should defendant commit a new felony upon release from custody on his current sentence. Rather, the issue is whether defendant's current sentence, enhanced pursuant to section 667.5, subdivision (b), must now be altered because, *subsequent* to defendant's sentencing, the convictions that gave rise to th[ose] enhancement[s] were reduced to misdemeanors pursuant to section 1170.18, subdivision (f). In other words, does the Act operate retroactively?" (*Johnson, supra,* 8 Cal.App.5th at p. 119.) We turn to the language of section 1170.18 and to voter intent in making that determination. (*Ibid.)*

"Section 3 specifies that no part of the Penal Code 'is retroactive, unless expressly so declared.' This language 'erects a strong presumption of prospective operation, codifying the principle that, "in the absence of an express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature [or electorate] … must have intended a retroactive application." [Citations.] Accordingly, "'a statute that is ambiguous with respect to retroactive application is construed … to be unambiguously prospective.'" [Citation.]' [Citation.]

"An 'important, contextually specific qualification' to the prospective-only presumption regarding statutory amendments was set forth in *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*). [Citation.] That qualification is: 'When the Legislature [or electorate] has amended a statute to reduce the punishment for a particular criminal offense, we will assume, absent evidence to the contrary, that the Legislature [or electorate] intended the amended statute to apply to all defendants whose judgments are not yet final on the statute's operative date. (Citation.]' [Citation.]

"Although *Estrada's* language is broad, the California Supreme Court has emphasized the rule's narrowness (*People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1196, disapproved on another ground in *People v. Rangel* (2016) 62 Cal.4th 1192, 1216):

'*Estrada* is today properly understood, not as weakening or modifying the default rule of prospective operation codified in section 3, but rather as informing the rule's application in a specific context by articulating the reasonable presumption that a legislative [or voter] act mitigating the punishment for a particular criminal offense is intended to apply to all nonfinal judgments. [Citation.]' [Citation.]

"The question of retroactivity is ultimately one of legislative—or, in this case, voter—intent. [Citations.] 'To resolve this very specific retroactivity question, we apply the well-settled rules governing interpretation of voter intent ….' [Citation.] '"In interpreting a voter initiative …, we apply the same principles that govern statutory construction. [Citation.] Thus, … 'we turn first to the language of the statute, giving the words their ordinary meaning.' [Citation.] … The statutory language must also be construed in the context of the statute as a whole and the overall statutory scheme [in light of the electorate's intent]. [Citation.] … When the language is ambiguous, 'we refer to other indicia of the voters' intent, particularly the analyses and arguments contained in the official ballot pamphlet.' [Citation.]" [Citation.] [¶] In other words, our "task is simply to interpret and apply the initiative's language so as to effectuate the electorate's intent." [Citation.]' [Citation.]

"The Act clearly was intended to lessen punishment for 'nonserious, nonviolent crimes like petty theft and drug possession' (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of Prop. 47, § 3, subd. (3), p. 70), in order 'to ensure that prison spending is focused on violent and serious offenses ….' (*Id.*, § 2, p. 70.)[7] This purpose was conveyed to voters, both in the text of the then-proposed law and in the arguments supporting Proposition 47. (Voter Information Guide, Gen. Elec., *supra*, argument in favor of Prop. 47, p. 38; *id.*, rebuttal to argument against Prop. 47, p. 39; *id.*, text of Prop. 47, §§ 2, 3, p. 70.)

"[7] The voter [information] guide can be accessed at http://www.sos.ca.gov/elections/voting-resources/voter-information-guides/ (as of Feb. [24], 2017)."

"Nowhere, however, do the Act or the ballot materials refererence section 667.5, subdivision (b) or mention recidivist enhancements, and the Act made no amendments to any such provisions. Two of the Act's expressly stated purposes, however, are to '[a]uthorize consideration of resentencing for anyone who is currently serving a sentence for any of the offenses' that would be made misdemeanors by the Act, and to '[r]equire a thorough review of criminal history and risk assessment of any individuals before resentencing to ensure that they do not pose a risk to public safety.' (Voter Information Guide, Gen. Elec., *supra*, text of Prop. 47, § 3, subds. (4), (5), p. 70.) Voters were assured the Act would keep dangerous criminals locked up (Voter Information Guide, Gen. Elec., *supra*, argument in favor of Prop. 47, p. 38), and that it would not require automatic release of anyone: 'There is no automatic release. [Proposition 47] includes strict protections to protect public safety and make sure rapists, murderers, molesters and the most dangerous criminals cannot benefit.' (*Id.*, rebuttal to argument against Prop. 47, p. 39.)

"'Imposition of a sentence enhancement under … section 667.5 requires proof that the defendant: (1) was previously convicted of a felony; (2) was imprisoned as a result of that conviction; (3) completed that term of imprisonment; and (4) did not remain free for five years of both prison custody and the commission of a new offense resulting in a felony conviction. [Citation.]'[8] [Citation.] 'Sentence enhancements for prior prison

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"[8] Section 667.5, subdivision (b), currently provides: 'Except where subdivision (a) applies, where the new offense is any felony for which a prison sentence or a sentence of imprisonment in a county jail under subdivision (h) of Section 1170 is imposed or is not suspended, in addition and consecutive to any other sentence therefor, the court shall impose a one-year term for each prior separate prison term or county jail term imposed under subdivision (h) of Section 1170 or when sentence is not suspended for any felony; provided that no additional term shall be imposed under this subdivision for any prison term or county jail term imposed under subdivision (h) of Section 1170 or when sentence is not suspended prior to a period of five years in which the defendant remained free of both the commission of an offense which results in a felony conviction, and prison custody or the imposition of a term of jail custody imposed under subdivision (h) of Section 1170 or any felony sentence that is not suspended. A term imposed under the provisions of paragraph (5) of subdivision (h) of Section 1170, wherein a portion of the

terms are based on the defendant's status as a recidivist, and not on the underlying criminal conduct, or the act or omission, giving rise to the current conviction. [Citations.]' [Citations.] Thus, the purpose of an enhancement under section 667.5, subdivision (b) 'is "to punish individuals" who have shown that they are "'hardened criminal[s] who [are] undeterred by the fear of prison.'" [Citation.]' [Citation.] The enhancement's focus on the service of a prison term 'indicates the special significance which the Legislature has attached to incarceration in our most restrictive penal institutions.' [Citation.]" (*Johnson, supra*, 8 Cal.App.5th at pp. 119–122.)

As we have recognized, "[a] person who refuses to reform even after serving time in prison is clearly and significantly more dangerous than someone who merely possesses drugs for personal use or shoplifts. We cannot conclude, from the language of the Act or the ballot materials, that voters deemed such persons to be nonserious, nondangerous offenders, and so intended the Act to reach back to ancillary consequences such as enhancements resulting from recidivism considered serious enough to warrant additional punishment. Accordingly, section 3's default rule of prospective operation, and not *Estrada's* narrow rule of retroactivity, applies." (*Johnson, supra*, 8 Cal.App.5th at p. 122.)

In sum, we find "[n]othing in the language of the Act or the ballot materials indicates an intention to override the operation of section 667.5, subdivision (b), at least retroactively." (*Johnson, supra*, 8 Cal.App.5th. at p. 123.) "Defendant served … prison term[s] for the prior convictions at a time when the offenses were felonies. It is the service of th[ose] prison term[s], coupled with defendant's continuing recidivism, that section 667.5, subdivision (b) punishes. Absent a clear statement of the electorate's intent to the contrary—which we do not find—we conclude that, because defendant

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term is suspended by the court to allow mandatory supervision, shall qualify as a prior county jail term for the purposes of the one-year enhancement.'"

served … prison term[s] for his [underlying offenses] at a time when the offenses were felonies, and had his current sentence enhanced accordingly *before* the convictions were reduced, he is not entitled to relief." (*Ibid.*)

As we observed in *Johnson*, "[t]his conclusion does not render surplusage or eviscerate the 'for all purposes' language of section 1170.18, subdivision (k). Our determination is one of the electorate's intent. 'Rules such as those directing courts to avoid interpreting legislative enactments as surplusage are mere guides and will not be used to defeat legislative intent. [Citations.]' [Citation.] Moreover, 'ambiguities are not interpreted in the defendant's favor if such an interpretation would provide an absurd result, or a result inconsistent with apparent legislative intent. [Citation.]' [Citation.]" (*Johnson*, *supra*, 8 Cal.App.5th at p. 123.)

In accordance with *Johnson*, we reject defendant's argument and find that a previously imposed sentence enhanced by a section 667.5, subdivision (b), prior prison term is not altered by the granting of a Proposition 47 petition reducing the felony that gave rise to that prior prison term to a misdemeanor.[8] *(Johnson*, *supra*, 8 Cal.App.5th at p. 123)

[8] Based on this conclusion, we need not reach the People's argument that defendant's motion to strike the prior prison term enhancements was untimely or their request for remand to withdraw from the parties' plea bargain in the event we find the trial court erred in denying defendant's motion to dismiss.

DISPOSITION

The order denying defendant's motion to strike his two prior prison term enhancements (§ 667.5, subd. (b)) is affirmed.

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KANE, J.

WE CONCUR:

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LEVY, Acting P.J.

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GOMES, J.